

ORIGINAL

NO. 80771-0

THE SUPREME COURT OF THE STATE OF WASHINGTON

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JOHN L. HALE AND ROBBIN HALE,  
Petitioners

v.

WELLPINIT SCHOOL DISTRICT NO. 49,  
Respondent

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RESPONDENT'S RESPONSE TO AMICUS ARGUMENTS

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**A.     RESPONDENT'S RESPONSE TO AMICUS ARGUMENTS**

**1.     There Is No Doubt That SB 5340 Was Amendment.**

The Human Rights Commission frames the issue thusly: Do separation of powers principals preclude the Legislature from amending the WLAD to include for the first time a statutory definition of “disability” that applies retroactively to cases arising before the *McClarty* decision? *Human Rights Commission Brief*, p. 2. The Washington Employment Lawyers’ Association does not frame an issue but rather launches into its argument “The Defendant is wrong” (*Employment Lawyers’ Brief*, p. 3) and then relies on federal case law to explain why. Yet the federal law cited is more expansive than Washington case law, ignoring the “clarification” vs. “amendment” analysis. *Employment Lawyers’ Brief*, p. 5. That does not help with the analysis since this case is controlled by Washington law.

Finally, the *amicus* Senators frame the issue as: “. . . whether the Washington Legislature has the constitutional authority to correct *McClarty v. Totem Electric’s* erroneous foray into the realm of legislative policymaking and restore the preexisting definition of ‘disability’ for discrimination claims accruing prior to the date of that decision.” *Senators’ Brief*, p. 2. This assumes first that this Court was wrong in its

*McClarty* decision and, second, that the WLAD contained a definition of “disability” in the first place. Neither is correct.

Critical to the analysis is the Senators’ statement in argument that the Legislature chose to “correct” an “error”. That is, they intended a change, an amendment. At the very root of the Senators’ argument is the fact that SB 5340 was intended to overrule this Court’s decision in *McClarty v. Totem Electric*, 157 Wash.2d 214, 137 P.2d 844 (2006).

In *Johnson vs. Morris*, 87 Wn.2d 922, 925, 557 P.2d 1299 (1976), this Court held:

Petitioner cites no authority for the proposition that the legislature is empowered to retroactively “clarify” an existing statute, when that clarification contravenes the construction placed upon that statute by this court. Such a proposition is disturbing in that it would effectively be giving license to the legislature to overrule this court, raising separation of powers problems.

Once a statute has been construed by the judiciary that construction operates as if it were originally written into the statute. *Johnson vs. Morris*, 87 Wn.2d 922, 929-27-28. That is precisely what happened here.

Some *Amicus* argue that the Legislature was merely attempting to return the definition to that recognized prior to *McClarty*. However, “even a clarifying enactment cannot be applied retrospectively when it contravenes a construction placed on the original statute by the judiciary. Any other result would make the legislature the court of last resort.” *State*

*vs. Dunaway*, 109 Wn.2d 207, 216 n. 6, 749 P.2d 160 (1988). Once this Court has construed a statute its meaning is no longer ambiguous and it may not be amended to have effect retroactively, overruling the Court.

An amendment is curative and remedial [and retroactive] if it clarifies or technically corrects an ambiguous statute without changing prior case law construction of the statute.

*Barstad vs. Stewart Title Guaranty Co.*, 145 Wn.2d 528, 537, 39 P.3d 984 (2002). Stated another way, where there is amendment of a statute and there has been no judicial interpretation or construction placed upon the statute, it is clarifying, curative, and remedial and therefore retroactive. *State vs. Jones*, 110 Wn.2d 74, 82, 750 P.2d 620 (1988). “Curative” and “clarifying” amendments are retroactive by definition because they do not change the law, but rather *clarify* what it has always been. *Magula vs. Benton Franklin Title Co.*, 131 Wn.2d 171, 182, 930 P.2d 307 (1997). If the Court has already ruled on the construction of a statute, very simply any purported retroactive application of new legislation would violate the separation of powers doctrine. *In Re Stewart*, 115 Wn.App. 319, 333, 339-42, 75 P.3d 521 (2003). See also *American Discount vs. Shepherd*, 129 Wn.App. 345, 355-56, 120 P.3d 96 (2005).

Further, the action of the Legislature is not “remedial” in nature since the passage of SB 5340 did not relate to practice, procedure or the forms of remedies. Rather, in direct response to *McClarty* the Legislature

created new substantive or vested rights. *Johnston vs. Beneficial Management Corporation*, 85 Wn.2d 637, 641, 538 P.2d 510 (1975). A statute which creates a new liability will not be construed retroactively. *Id.*, at 642.

In *McClarty* this Court noted that the WLAD had failed to provide a definition of “disability.” *McClarty*, 157 Wn.2d at 225. After *McClarty* the Legislature specifically cited its distaste for that decision and passed SB 5340. Therefore without question the new definition of “disability” in SB 5340 was a direct result of *McClarty* enacted with the purpose of overruling that case. Even though the Human Rights Commission contends otherwise (*Human Rights Commission Brief*, p. 10) SB 5340 is an amendment to the original act and has prospective application only.

SB 5340 expands both the scope of RCW 49.60 and the definition used by the Human Rights Commission prior to *McClarty*, resulting in a substantive, and not remedial, change in the law. Because the amendment was intended to change the meaning of the term “disability” as construed by the Washington Supreme Court in *McClarty*, the separation of powers doctrine dictates that the amendment apply prospectively only. *State vs. Posey*, 130 Wn.App. 262, 274 (2005).

The Senators argue that the Legislature was “well aware” of definitions both state and federal back in the 1970s (*Senators’ Brief* p. 3) but that is irrelevant. If the Senators can make such a statement and expect it to be persuasive in this case then it follows that when the Legislature changed terminology from “handicap” to “disability” in 1993 (*Senators’ Brief*, p. 4) its intent was to bring the Washington definition in line with the federal definition of “disability”. Even Governor Lowrey favored the federal model. *Senators’ Brief*, p. 5.

What greater significance should this Court attach to the Legislature’s lack of any action after this Court rendered *Pulcino vs. Federal Express Corp.*, 141 Wn.2d 629, 9 P.3d 787 (2000)? This, according to the Senators, was “the Legislature’s evident endorsement of *Pulcino*” (*Senators’ Brief*, p. 10), a rather significant but factually unsupported conclusion in itself. If that is true then it is equally clear that the Legislature did nothing despite this Court’s invitation to clear up the uncertainty. So, this Court defined “disability” consistent with the ADA in *McClarty*. The Senators’ argument under *Sedlacek vs. Hillis*, 145 Wn.2d 379, 36 P.3d 1014 (2001) is a stretch in that the *Sedlacek* decision involved an argument by a claimant that this Court should adopt an ADA policy wholly new to Washington State: the protection of able-bodied individuals under the laws against discrimination merely because of their

association with a disabled person. The *Sedlacek* Court refused to do that and rightfully so. That type of action would have been legislation by the judiciary; clearly distinct from this case.

Here, the Legislature had failed to provide a statutory definition of “disability” prior to this SB 5340 so there was nothing to “clarify.” The judicial branch of our state government – this Court – interpreted that undefined term of art according to the federal ADA and the plain meaning of the word. Only after that did the Legislature *amend* the act by *adding* a definition. It was not clarification; there was nothing existing in the WLAD which required clarification. The amendment of the WLAD cannot be applied retroactively.

**2. The “McClarty Window” Does Not Save The Amendment.**

The new statute created a “safe harbor” that was exempted from the reach of the statute.

*Employment Lawyers’ Brief*, p. 13. Please review the Employment Lawyers’ argument at p. 18 of its *Brief*. According to that Association, Legislation is retroactive when the statutory language is “so clear that it can sustain only one interpretation.” By making that statement, the Employment Lawyers acknowledge that the Legislature outfoxed itself by creating the “McClarty Window”. In other words, the only way for SB 5340 to be retroactive is if it applied to all cases pending when SSB 5340

was made effective. But the Legislature could not stop there. Rather, when the Legislature left open that very small window for *McClarty* cases it acknowledged that it was indeed overruling the *McClarty* decision.

In fact, the legislation of SB 5340 renders *McClarty* an aberration; a deviation from what the Legislature considers to be the correct path. No one doubts the principals behind the “separation of powers” by which our system of government by laws is implemented. What is at issue here is one branch of that government –the legislative - overreaching into the responsibility of another branch – the judicial – by creating new law which erases a decision of the judicial branch. It has in fact changed the rules.

The fact remains that the Legislature amended RCW 49.60 to include a definition of “disability” which is in no way clarifies the *McClarty* definition. SB 5340 was in fact new. This Court had interpreted “disability” in *McClarty* and therefore any issue of ambiguity was resolved by that decision. Whatever the Legislature *intended* in this matter, the fact remains that by enacting SB 5340 the Legislature amended prior law, it added or substituted a definition which was at odds with what our Supreme Court had previously decided, and therefore it invaded the province of the judiciary.

*Amicus* argue that because the Legislature left a time period between McClarty and the effective date of the amendment open to construction under *McClarty*, it did not overrule that case. The legislature “appears to have carefully selected the effective dates for the new definition of disability.” *Delaplaine vs. United Airlines, Inc.*, 518 F.Supp. 1275, 1278-79 (W.D. Wash. 2007), cited at footnote 1 of the *Human Rights Commission Brief*, p. 2. “The new statutory definition is specifically limited” in its application. *Human Rights Commission*, p. 8.

The problem is recognized by the Human Rights Commission when it glosses over the issue with “Such usurpation occurs only if the law either overrules or contravenes a Supreme Court decision. *Human Rights Commission Brief*, p. 8. “The law here does not disturb the construction given to the law by the *McClarty* Court.” *Id.* at 8, because it left that one narrow window of applicability of *McClarty*.

By limiting the retroactive application of the statute, the Legislature did not threaten the judicial function of the Washington Supreme Court and its power to decide cases. It did not overrule the Court’s judgment, because there was no statutory definition of disability for the Court to interpret in *McClarty*. There Legislature merely retroactively amended the law. In fact, the Legislature carefully crafted SB 5340 so as not to impact any substantive or vested right that may have arisen from July 6, 2006 to July 22, 2007, as a result of the *McClarty* decision. Consequently, the Legislature did not violate the separation of powers doctrine when it made SSB 5340 retroactive.

*Human Rights Commission Brief*, p. 17. There is no doubt that this infringement on the separation of powers conjures the very mischief that the doctrine was designed to prevent – unpredictability and the control of one branch of government by another. Before SB 5340 there was only *McClarty*. By this *amendment* the Legislature erased case law precedent and attempted to hide that impact by leaving open a very limited window of time where *McClarty* would apply. That is disingenuous.

“A court may not rewrite an existing law . . .” *Senators’ Brief*, p. 10. No doubt about that. In this instance the only salient question is “what did the Legislature do?” If it amended the WLAD then its attempt to overrule the *McClarty* decision by legislation was beyond the scope of its recognized power. The Superior Court determined that it was. If it merely clarified existing law then it could attempt to make the new definition of “disability” retroactive. The fact that the Legislature left the “*McClarty* window” open for a period of approximately one year shows that it understood its actions were amendatory and that it was, in fact, overruling case law.

. . . SB 5340 does not actually ‘contravene’ or overrule the *McClarty* decision.

*Senators’ Brief*, p. 13. Is that why the Legislature left the “*McClarty* window” open? According to the Senators, this actually “represents a

compromise between the branches of government with regard to retroactivity and stands as a hallmark of the constitutional system of checks and balances.” *Senators’ Brief*, p. 14. And yet in the very next sentence the Senators label this Court’s decision in *McClarty* as “an erroneous judicial transgression into the legislative policymaking arena.”

*Id.* So which is it?

## **B. CONCLUSION**

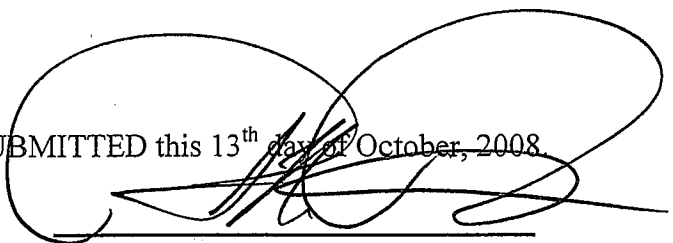
Full support for the Superior Court’s decision herein is found within the *Amicus* brief provided by the Senators, *to wit*:

In enacting SB 5340, the Legislature told the Court in no uncertain terms that *McClarty* was a fundamentally flawed decision.

*Senators’ Brief*, p. 13. Admittedly, the Senators overruled case law with SB 5340; it severely limited *McClarty* in the guise of a very narrow window of applicability and otherwise inserted a definition of “disability” which extinguished the applicability of case law. It violated the doctrine of separation of powers. Federal cases need not be examined.

The Trial Court’s *Order Granting Defendant’s Motion For Summary Judgment* and its *Order Denying Plaintiffs’ Motion For Reconsideration* should be affirmed.

RESPECTFULLY SUBMITTED this 13<sup>th</sup> day of October, 2008.

A large, stylized handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned over the date and the name of the signatory.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 13<sup>th</sup> day of October, 2008, a true and correct copy of the foregoing ***Respondent's Response To Amicus Briefing***, was served upon the following parties and their counsel of record in the manner indicated below:

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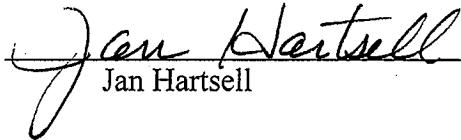
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